# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CRIMINAL APPLICATION No. 597 of 2006

**HONOURABLE MR.JUSTICE KS JHAVERI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**LAKHI MULUBHAI MODHVADIA - Applicant(s)**
**Versus**
**STATE OF GUJARAT & 2 - Respondent(s)**

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**Appearance :**
MR YATIN OZA, SENIOR COUNSEL with MR BP GUPTA for Applicant
MR PD BHATE, APP, for Respondent(s) : 1,
MR YN RAVANI for Respondent(s) : 2,
MR PM THAKKAR, SENIOR COUNSEL for Respondent(s) : 3,

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**CORAM : HONOURABLE MR.JUSTICE KS JHAVERI**

**Date : 01/02/2007**

**ORAL JUDGMENT**

1.0 The petitioner has prayed for a direction to hand over the investigation of complaint being C.R. No.I 170 of 2005 registered with Kamalbag Police Station, Porbandar to Central Bureau of Investigation.

2.0 The petitioner is widow of deceased Mulubhai Gigabhai Modhvadia.The case of the petitioner is that the husband of the petitioner was in the business of mining and trading of lime stone. Babubhai Bhimabhai Bokhiria, the respondent no.3 herein, who is an ex-Minister, is also carrying on the same business and therefore there was stiff competition between them. According to the petitioner, the husband of the petitioner was murdered on 16.11.2005 at the behest of respondent no.3. It is alleged that in past on many occasions, there was threat on the part of respondent no.3 to the husband of the petitioner, which fact was disclosed to the petitioner.

2.1 In the first information report also son of the petitioner stated that the murder of his father was at the instance of the respondent no.3. It is further alleged that at the time of his death, husband of the petitioner was carrying a purse from which a letter written by him was recovered wherein it is stated that there was serious threat to his life from the respondent no.3 and if anything unusual happens to him, then it should be presumed that it has happened at the instance of the respondent. It was also stated in the said letter that he had not informed about the incident to the police because the respondent no.3 has political backing.

2.2 According to the petitioner in spite of repeated requests to treat the said letter as the dying declaration of the husband of the petitioner,

the authorities have not acceded to the same. It is further alleged that according to prosecution story, one Bhima Dula has shot at the husband and the said Bhima Dula is business partner of the respondent no.3 and therefore respondent no.3 is involved in the murder. It is stated that the husband of the petitioner had good business relations with Tata Chemicals and respondent no.3 and Bhima Dula were not able to do business freely as a result of which they committed the alleged crime. According to the petitioner, the police has not investigated the case properly and therefore the investigation requires to be handed over to CBI.

3.0 Mr. Yatin Oza, learned Senior Counsel for the petitioner submitted that one of the persons who is involved in the killing operation is one Samat Gogan, who was released on anticipatory bail by Sessions Court. He submitted that he was moving with Chief Minister in the village of Bhima Dula along with senior police officers and he was released on Anticipatory bail which was facilitated by Public Prosecutor. He submitted that in the case of other two accused in connection with the same incident i.e. Rajubhai Karsanbhai Odedra and Dudabhai Hajabhai Odedra were released on bail and the State had preferred bail applications only after the accused were released and out of jail.

3.1 Learned Counsel for the petitioner submitted that the whole conspiracy was hatched so as to keep her husband out of house till mid night. A dinner party was arranged at the farm house of Karsan Dula. After the party the husband of the petitioner was accompanied by one Shri Pratapbhai, an NRI friend and he was dropped at Millenium Tower. Laman Bhima phoned him to know the deceased and thereafter there was a continuous conversation between Laxman Bhima and the deceased. He submitted that Karsan Dula is brother of Bhima Dula, who

is alleged to have shot the deceased is from ruling Bhartiya Janta Party. According to learned counsel, he is one of the main conspirators and the main accused are not being arrested. According to the petitioner, the State machinery is not discharging its duties properly and even Dr. Vipul Agrawal, DSP was transferred so that the investigation may not be done properly.

3.2 Learned Counsel for the petitioner further submitted that there are serious lapses in the investigation and the investigation was carried out in such a faction that ultimately all the accused will be acquitted. He therefore submitted that the investigation requires to be handed over to CBI.

3.3 In support of his contention learned Counsel for the petitioner has relied upon a decision in the case of Dharmishtaben Narendrasinh Zala vs. State of Gujarat and others, reported in 1997 CRI. L.J. 3866 wherein it is held that the High Court has power to direct case to be investigated by CBI.

3.4 He has also relied upon a decision of the Apex Court in the case of Hemant Dhasmana Vs. Central Bureau of Investigation and Another, reported in (2001)7 SCC 536 wherein it is held that if the final report submitted by police concludes that no offence was committed, contrary to the allegations made in the complaint, it is open tot he Magistrate to order further investigation to be made by police.

4.0 Mr.P.D. Bhate, learned APP, appearing for the State opposed the petition by stating that the inquiry has been conducted properly and there are no lapses on the part of the investigating agency. He submitted that in respect of alleged letter written by the deceased,

specific question was put, but the suspicion was not supported by any evidence to point the finger at Babubhai Bokhiriya. He stated that the respondent no.3 was also questioned and he had replied that being a party member, he would often talk to Lakhaman Bhima, Karshan Dula and other works of BJP. Learned APP therefore submitted that from the inquiry nothing is found against the respondent no.3. He further pointed out that earlier statement of deceased Mulubhai was recorded and in his statement he had clearly indicated that he had no enemies nor he considers his life to be in danger.

5.0 Mr. P.M.Thakkar, learned Senior Counsel appearing for respondent no.3 submitted that even in the investigation nothing has been found against respondent no.3. According to him the respondent no.3 has also been interrogated and the investigation was carried out properly and merely because of apprehension of the petitioner an innocent man may not be dragged into prosecution. Learned Counsel has relied upon various authorities which will be discussed hereinafter.

6.0 The present petition is mainly based upon the contention that the police authority has not inquired into the matter properly and that there was a conspiracy for committing the alleged crime. The further grievance is that certain accused including the respondent no.3 are involved in the alleged incident and they were not roped into the offence and therefore there is serious lapse on the part of the police authorities. In the petition the petitioner has narrated the version of the petitioner and the apprehensions. It is on this apprehension the prayer for handing over the investigation to CBI is made. One of the contentions is that a letter was found from the purse of the deceased which involved the respondent no.3 herein and therefore the authority should have taken necessary action. In this behalf it would be relevant to note the reply of

the State as made in paras 5 and 6 as under:

> "5. In this offence, from the purse of the deceased along with other articles, a handwritten note purportedly to be handwriting of the deceased himself was also recovered. Note was dated 18.11.2004 and the content of the note is to the effect that he is receiving threat on phone, if any time, he is murdered then, one Babubhai Bokhiriya is responsible. The family members in their statements have also suspected hand of said Babubhai Bokhiriya in the murder of Mulubhai. With this in mind, specific questions were put to arrest accused as well as other independent witnesses so that some lead or some evidence is found to involve said Babubhai Bokhiriya in this offence. However, said suspicion is not supported by any evidence whatsoever to point the finger towards Babubhai Bokhiriya. The investigation is also proceeded to cover the telephonic conversation between all the accused persons and specific concentration on the fact that whether any accused person had telephone conversation with said Babubhai Bokhiriya from his mobile or his landline numbers. This has also revealed that there are no telephonic conversations except for a telephonic talk with Lakhaman Bhima. Therefore, specific question was put to Babubhai Bokhiriya when his statement was recorded during the course of investigation on 07.12.2005, to which, he has replied that being as party member, he would often talk to Lakhaman Bhima, Karshan Dula and other workers of the B.J.P. There is no witness to point the finger that said Abbubhai Bokhiriya had ever met any of the accused persons in recent past. The investigation has also revealed that an incident which occurred on 15.01.2005 with regards to the incident about the firing which took place in the vadi of accused Bhima Dula Odedara and an application to inquire into that was received by the Police Authority and in that application, it was revealed that there is danger on the head of accused viz. Bhima Dula, Dudha Haja and deceased-Mulubhai and one Ramade Modavadiya. This application was inquired into by D.S.P. Head Quarter and in his inquiry on 12.03.2005, the statement of deceased Mulubhai was recorded and in his statement, he clearly indicated that he has no enemies nor he considers his life to be in danger.

6. That on 25.11.2004, the District Collector received an application for licence to hold weapon from deceased-Mulubhai. In his application, it is indicated that since he is working as a approved contractor, he has to visit all over Gujarat and is also required to carry huge amount of money in cash and for that purpose for his safety, he required fire arms. In the course of the application, verification by office of the D.S.P. Was carried out and on 30.11.2004, statement was recorded of deceased Mulubhai, there also, he has stated that on account of his business, he has to carry out visit all over Gujarat with cash monies, but he has not raised any suspicion of enmity or danger to his own life. Even his statement dated 28.02.2005 before the Sub-Divisional Magistrate and statement dated 17.05.2005 before the District Magistrate, he has revealed the same thing, but nowhere has deceased pointed towards a threat to his life due to any vengeance or threat to his life from any other persons.

A specific investigation was carried out in that direction to find out the enmity existing between the deceased and Shri Babubhai Bokhiriya, but neither at political programme, social programme and social programme of Mayer community in particular was ever reported or has come on record that there was any fighting, scuffle or even verbal exchange of hot word. When on many occasions, both these persons have attended these functions simultaneously. Specific investigation to find out the motive which can be attributed to Shri Babu Bokhiriya also did not reveal anything. In this direction, statement of all the persons who were present in the party of the previous night of the incident were recorded. Each of such person were a leading person in their respective field and, therefore, beyond influence by anybody, yet none of the person in their statement suggested any involvement of Shri Babubhai. In fact, specific question in relation to the chit was also put to witness like Raniben Keshvala, who again in her statement has categorically denied any possibility of involvement of Shri Babubhai. Similarly, the arrested accused were also thoroughly interrogated on the point of the note found in pocket of deceased – Mulubhai. There also, there was categorical denial of involvement of any knowledge."

6.1 No rejoinder has been filed to the same and it is, therefore, evident that the police have in fact inquired about the letter in question. There was inquiry about the telephonic conversation also and it was found that the respondent no.3 used to talk to Lakhaman Bhima, Karshan Dula and other workers of BJP and there was no witness to point out the involvement of respondent no.3. In absence of any such evidence, it cannot be said that it is because of the lapse on the part of the police authorities, he is absolved from the alleged crime.

6.2 Further, in connection with the incident of a firing which took place in the Vadi of accused Bhima Dula Odedra, an inquiry was made wherein the deceased had stated that he had no enemies nor was there any threat to his life. The police authority has also interrogated all the persons who were present in the party on the previous night of the incident and none had even remotely suggested involvement of the respondent no.3. The affidavit in reply categorically stated the investigation made by the police authorities and the petitioner is unable to point out any lacuna in such inquiry.

6.3 The grievance of the petitioner is that the police has not accepted the conspiracy theory and therefore, the investigation was not proper. However, from the papers on record it appears that the police has inquired into the allegations from the angle of the story of the petitioner also, but no evidence was available to accept such theory. In that view of the matter, I am of the view that merely because the theory of the petitioner could not be accepted by the police in absence of evidence, the petitioner is not justified in stating that the police has not carried out the investigation properly and therefore the inquiry should be handed

over to CBI.

7.0 In the case of Popular Muthiah Vs. State, reported in (2006)7 SCC 296 it is held that the High Court cannot direct the State to take advice of Public Prosecutor as regards provisions where under those persons had to be charged, nor can it direct CB/CID to reinvestigate and prosecute those persons since it cannot direct to reinvestigate the case from a particular angle or by a particular agency.

7.1 In the case of All India Institute of Medical Sciences Employees' Union Vs. Union of India and others, reported in (1996) 11 SCC 582 it is held that in case no action is taken by the police upon a complaint, the complainant can file a complaint before the Magistrate having jurisdiction to take cognizance of the offence and complainant is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by CBI.

7.2 In the case of Central Bureau of Investigation V. State of Rajasthan and Another, reported in (2001)3 SCC 333, the Apex Court held that the Supreme Court under Articles 32 and 142 and High Court under Article 226 can, in certain cases, direct CBI to conduct investigation into any offence, but this power has to be exercised sparingly.

7.3 In the case of Hari Singh V. State of U.P., reported in 2006 AIR SCW 3230 it is held that in case of failure of police to investigate a complaint, the complainant can lay complaint before Magistrate and writ petition by complainant for direction to CBI to investigate the complaint is not tenable.

8.0 Thus, it is well settled law that the High Court cannot direct CBI to inquire into a matter in ordinary circumstances. On the facts of the present case the petitioner has not pointed out any serious lapse or lethargy on the part of the investigating agency which requires a reinvestigation. The only case of the petitioner is that the police has not investigated the case on a particular angle or on the story based by the petitioner. That cannot be a ground for issuance of a direction to handover the investigation to CBI. After a thorough perusal of the papers on record, this Court is not satisfied about the existence of a strong prima facie case for handing over the case to CBI especially, the police has carried out the investigation on various aspects raised by the petitioner.

9.0 A contention has been raised by the learned counsel for the petitioner that the officer has not carried out narcotic test and there was no inquiry about the phone conversation of respondent no.3. As regards the telephone conversation is concerned, I am of the view that inquiry has been made into that aspect by the police. As regards the narcotic test is concerned, I am of the view that the investigating authority is the best authority to decide the course of action and the complainant cannot have any say about the manner in which the investigation is required to be conducted.

10.0 In the case of Dharmishtaben Narendrasinh Zala (supra) cited on behalf of the petitioner, there was ample evidence to prove the allegations leveled therein and it was in respect of custodial death. On the facts of the present case the ratio laid down in the said decision cannot be of any assistance to the petitioner. Even as per the second decision in the case of Hemant Dhasmana (supra) relied upon by the

learned counsel for the petitioner, it is open to the petitioner to approach the concerned Magistrate for appropriate directions.

11.0 In Special Criminal Application No.1875 of 2005, under similar circumstances, this Court, by order dated 8th December 2006 has declined to transfer the investigation to CBI and on the very same principles the prayers made in this petition cannot be granted.

12.0 It will not be out of place to refer to the Central bureau of Investigation (Crime) Manual wherein it is stated that the assistance of CBI can be made available to State Police Forces only on request on the part of the State and in the present case the State has not deemed it fit to make such a request. Clauses 1.13 and 1.14 of the Central Bureau of Investigation (Crime) Manual which read as under:

> 1.13 The services of the CBI are available tot he States in taking up investigation of certain specified categories of serious offences having ramifications in more than one State. Matters relating to such cases requiring attention at the CBI Headquarters may be referred to the local Branch of the CBI which, in turn, will inform the Joint Director concerned or the Special/Additional Director concerned or the Director, CBI, as the case may be.
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> 1.14 For success in investigation of cases, it is most essential that a decision as to which agency is to investigate, be taken very quickly. References about cases to be entrusted to the CBI should be made as soon as possible by the State authorities. Similarly cases which the CBI feels should be handled by the State Police/Anti-Corruption or Vigilance set-up may be entrusted to them without delay. In case of any difficulty or disagreement,t he matter should be settled at a higher level between the State DGP and the Director, the Special/Additional Director or the Joint Director concerned in CBI."

In the present case there was no request from any quarter to entrust the case to CBI nor the State has found it fit to entrust the same to CBI as the State Police has been inquiring into the matter properly. Therefore, at this belated stage no useful purpose would be served by handing over the investigation to CBI.

13.0 At this stage it is required to be noted that the chargesheet has already been filed way back on 15th February 2006. Even during the investigation if the petitioner was not satisfied with the investigation it was always open to the petitioner to request for further investigation pointing out the lacuna, if any, in the investigation or it was also open to the petitioner to move the Magistrate with appropriate application under section 173(8) of the Criminal Procedure Code. The petitioner has not chosen to adopt this option available to her. In view of the fact that the petitioner has failed to point out any lapse or lacuna on the part of the investigating agency and merely because the police agency has not investigated the case on a particular angle this Court cannot direct that the investigation be handed over to CBI.

14.0 In the premises aforesaid, I do not find any merits in the petition. The same is, therefore dismissed. Rule is discharged.

15.0 If an appropriate application is made by the petitioner under section 173(8) of the Criminal Procedure Code, the trial court shall consider the same independently without being influenced by the observations made in this petition.

[K.S. JHAVERI, J.]

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